

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



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In the Matter of the Application of  
ILATANET, LLC for Authorization  
to obtain a Certificate of Public  
Convenience and Necessity as a  
Telephone Corporation Pursuant to  
the Provisions of Public Utilities Code  
Section 1001.

Application 14-01-029  
(Filed January 31, 2014)

**REPLY BRIEF  
OF THE CONSUMER PROTECTION AND ENFORCEMENT DIVISION**

**TRAVIS T. FOSS**

Attorney for the Consumer Protection and  
Enforcement Division

California Public Utilities Commission  
505 Van Ness Avenue  
San Francisco, CA 94102  
Phone: (415) 703-1998  
Email: [Travis.Foss@cpuc.ca.gov](mailto:Travis.Foss@cpuc.ca.gov)

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**I. INTRODUCTION**

Pursuant to the Assigned Commissioner’s Scoping Memo and Ruling (Scoping Memo) issued on May 9, 2016, the Consumer Protection and Enforcement Division<sup>1</sup> (CPED) submits this Reply Brief in the matter of Application (A.) 14-01-029 (Application).<sup>2</sup>

Ilatanet, LLC (“Ilatanet” or “Applicant”) continues to assert in its Opening Brief (OB) that the Commission lacks jurisdiction over the services offered by it, in defiance of the Administrative Law Judge (ALJ) Ruling dismissing Ilatanet’s Motion to Dismiss, which found that Ilatanet offers prepaid calling card services and must be registered under Public Utilities Code<sup>3</sup> Sections 885 and 1013.<sup>4</sup> The evidence proves that Ilatanet

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<sup>1</sup> SED’s Protest was submitted by the Commission’s Utility Enforcement Branch (UEB), which was part of the Commission’s Safety and Enforcement Division. As of June 1, 2016, UEB has been combined with other branches to form the Commission’s new Consumer Protection and Enforcement Division. Herein, this document refers to CPED as SED’s successor division.

<sup>2</sup> ALJ Smith extended the due date for reply briefs to July 6 from July 1, 2016.

<sup>3</sup> All section references are to the Public Utilities Code unless otherwise specified.

<sup>4</sup> ALJ Ruling at 7. The terms “prepaid calling card services” and “prepaid debit card services” are typically used interchangeably.

offers a prepaid calling card service as defined by Business and Professions (B&P) Code Section 17538.9, and must be registered to operate.

Further, Ilatanet fails to provide a rational explanation as to why Ilatanet and its owner Mr. Douglas Devine failed to abide by the terms of a previous judgment and stipulation that he signed, which required him to disclose the existence of the prior settlement and court order in any future filings with the Commission. Ilatanet's amended Application also mischaracterizes Ilatanet's services for the purpose of avoiding jurisdiction. Nothing in Ilatanet's OB adequately explains or mitigates the violations committed by Ilatanet and Mr. Devine, and thus penalties in an amount sufficient for deterrent effect are necessary and justified.

In addition to monetary fines, the Commission would be well-justified in denying Ilatanet's Application as a result of the violations and denying Ilatanet authority to operate because of Ilatanet's lack of fitness to operate. Ilatanet's OB fails to demonstrate fitness, as well as fails to provide required information in its Application, such as proof of financial responsibility, a performance bond, or provide evidence of appropriate managerial skill and experience, or evidence of appropriate measures taken to ensure future compliance in light of past problems and mismanagement.

CPED's Reply Brief addresses the mistakes of fact and law in Ilatanet's OB in the order in which they appear.

## **II. DISCUSSION**

The facts of this case are taken from Ilatanet's Application, CPED's investigation and Protest, Ilatanet's Motion to Dismiss, CPED's Response to the Motion to Dismiss and accompanying Staff Declaration of Brian Hom, prior court decisions involving Mr. Devine, a past Commission decision, and the Administrative Law Judge (ALJ) Ruling Denying the Motion to Dismiss. CPED's OB contains an extensive section on

background facts. CPED notes that Ilatanet's OB provides barely any citations for the facts set forth therein, many of which appear to be incorrect.<sup>5</sup>

CPED's replies to Ilatanet's arguments in response to the issues and questions set forth the Scoping Memo are set forth below.

**A. Is Ilatanet's principal, Douglas Devine, in full compliance with the terms and conditions of the settlement agreement adopted in D.07-11-003?<sup>6</sup>**

In response to this question, Ilatanet's OB states that "it is reasonable to conclude that the payments were paid prior to the time Ilatanet filed Application 14-01-029."<sup>7</sup>

CPED cannot discern how this response provides a meaningful or coherent answer to the question. The timing of the payments is not relevant to the question, which asks whether Mr. Devine is in compliance with the settlement agreement adopted in D.07-11-003. As described in CPED's OB, Ilatanet and Mr. Devine have violated the settlement agreement because: 1) Mr. Devine has continued to offer calling card services without first obtaining authority to do so; and 2) Ilatanet's Application identifies Mr. Devine as the CEO and President but fails to mention anything about the settlement agreement, D.07-11-003, or the SF Superior Court Final Judgment and Permanent Injunction, which was specifically required by the stipulated "All-Party Settlement" adopted in D.07-11-003.

Apparently, Ilatanet's OB focuses solely on the provision in the settlement requiring Mr. Devine to "state in such Application whether or not all payments have been made pursuant to such Stipulated Judgments."<sup>8</sup> Ilatanet fails to address the requirement

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<sup>5</sup> E.g., see Ilatanet OB at footnote 2 where it states that "Ilatanet does not employ cards", without any citation to any evidence; or footnote 5, where it states that there have been no complaints to the Commission, without any citation; or footnote 6, where it states that many of Ilatanet's customers have "turned to Skype or other Voice Over the Internet Protocol (VoIP)" without citation.

<sup>6</sup> Confusingly, Ilatanet has renumbered the issues in the Scoping Memo from #1, #2, #3, etc. to A, B, C, etc. CPED uses A, B, C, etc. to track the issues as they appear in Ilatanet's OB, although CPED's OB followed the numbering used in the Scoping Memo.

<sup>7</sup> Ilatanet OB at 4.

<sup>8</sup> CPED OB at 9.

in the settlement to identify in any future Commission applications the settlement and judgment, which is the alleged violation made by CPED here.

**B. What is the precise scope and nature of the telecommunications services being offered by Ilatanet in California?**

Ilatanet's OB states that it offers "pre-paid international telecommunications service," which it claims is somehow different than the pre-paid calling card services described in B&P Code Section 17538.9.<sup>2</sup> In support of this argument, Ilatanet makes several assertions that not only have no support in the record, but appear to be flatly contradicted by the evidence in the record.

For example, Ilatanet falsely claims:

- To offer "no intrastate service"; yet Ilatanet reported that its Tawag Na Direct (TND) service did permit intrastate calling;<sup>10</sup>
- Intrastate calls in California are blocked; yet at the PHC, Ilatanet stated that while it carried an "infinitesimal" level of intrastate traffic, it could block any intrastate traffic at its switch if necessary;<sup>11</sup>
- Ilatanet does not offer cards in the provision of its prepaid service; yet its initial Application asserted that it did offer cards, and the ALJ Ruling notes that on September 4, 2014, Ilatanet filed an amendment to the Application, deleting five references to "calling cards," but confirming "the purpose of the Application is unchanged";<sup>12</sup>
- Ilatanet's service does not require a PIN; yet the company's website repeatedly references a PIN and CPED's Declaration of Brian Hom demonstrates that he was able to contact a "My Tawag na Direct" associate,

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<sup>2</sup> Ilatanet OB at 4.

<sup>10</sup> ALJ Ruling at 2.

<sup>11</sup> Ilatanet Motion to Dismiss at 2; Prehearing Conference (PHC) Transcript at pages 28-29. Other than the unsupported statements in its OB, Ilatanet offers no evidence that intrastate calls are currently blocked.

<sup>12</sup> ALJ Ruling at 4.

who provided him with a PIN, security code, and access number upon the activation of his account.<sup>13</sup>

- Ilatanet's service is the same as "post-paid" services offered by other carriers; yet there is nothing in the record to support the description of "post-paid" services that would justify the comparison.

Ilatanet's OB is filled with unsupported facts such as the ones above. However, CPED is not persuaded in light of the fact that Ilatanet's amended Application deletes all the previous references to calling card services, apparently for the sole purpose of avoiding jurisdiction.<sup>14</sup> The evidence indicates Ilatanet offers prepaid calling card services, but regrets that it previously described them as such. CPED thoroughly addressed this issue in its OB.<sup>15</sup>

CPED agrees with the ALJ Ruling and concludes that Ilatanet is offering a calling card service. The ALJ Ruling found that Ilatanet offers a prepaid service that allows consumers to "originate calls through an access number and authorization code," which falls under B&P Code section 17538.9. Ilatanet has not changed its service, it has merely changed the characterization of its service. However, as the ALJ Ruling points out, the company's website reveals numerous references to both "PINS" and "calling cards," and the company's initial Application repeatedly referred to this Application as seeking authority to provide calling card services. The Commission should uphold the ALJ Ruling and conclude that Ilatanet's service is a calling card service that must be licensed under PU Code sections 885-886.

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<sup>13</sup> ALJ Ruling at 4; see also Declaration of Brian Hom, Attachment A to CPED's Reply to Motion to Dismiss.

<sup>14</sup> CPED Protest at 2.

<sup>15</sup> CPED OB, Issue #2.



**C. Is Ilatanet proposing to offer services for which operating authority from this Commission is required?**

Ilatanet argues that it does not offer any service under the Commission's jurisdiction.<sup>16</sup> However, as explained in CPED's OB, Section 885 grants the Commission jurisdiction to regulate prepaid calling cards, including entities that purchase time from underlying interexchange carriers and offer or administer the services of telephone prepaid debit cards. Such service providers are required to register with the Commission under Section 1013.

Two important and highly relevant cases regarding the Commission's jurisdiction over calling cards are *Skynet Communications* and *NobelTel*.

In *Skynet Communications*, applicant Skynet filed an application for permission to operate as a calling card provider, but then attempted to withdraw its application on the grounds that Skynet offered exclusively international traffic, and not intrastate traffic.<sup>17</sup> Skynet attempted to argue that there is an exception to the registration requirement simply because Skynet was a provider of international phonecards and its California intrastate traffic was *de minimis*. Like Ilatanet, Skynet contended that it is not required to register with the Commission as a provider of phonecards as required by Section 1013, because Section 885 only applies to intrastate services. The Commission flatly rejected that argument, stating: "There is no question that Skynet is a provider of phonecards in California. There is no exception to the registration requirement simply because Skynet is a provider of international phonecards..."<sup>18</sup>

The *NobelTel* decision followed exactly the holding of *Skynet*.<sup>19</sup> NobelTel is another company that offers pre-paid calling card services, and markets largely to international customers. NobelTel claimed that its prepaid calling cards are marketed for international calls and while the same calling cards may be used to make local calls in

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<sup>16</sup> Ilatanet OB at 6.

<sup>17</sup> *Skynet Communications*, D.09-01-017 at 3.

<sup>18</sup> *Ibid*.

<sup>19</sup> *NobelTel, LLC*, D.16-04-018 at 11.

California, around 99% of calls are international in nature. NobelTel argued that after its registration was revoked in 2012, NobelTel continued to operate without Commission authority because it was not required to maintain authority because its intrastate traffic was *de minimis*. The Commission held that “Prepaid phone card providers are subject to the registration requirements of Pub. Util. Code § 1013. There is no exception to the registration requirement simply because NobelTel is a provider of international phone cards and its California intrastate traffic is *de minimus*. Sections 885-886 require that all phone card providers register with this Commission...”

For purposes of jurisdiction, Skynet and NobelTel are indistinguishable from this proceeding. They establish conclusively that Ilatanet’s pre-paid calling card services are under the Commission’s jurisdiction, regardless of whether its services are minimally intrastate.

It should also be noted that Ilatanet’s OB does not address CPED’s argument that Ilatanet should have authority to operate regardless of whether it offers international telephone service or pre-paid calling card services, because if Ilatanet offers “resold interexchange service,” it must also be licensed under Section 1001. The Commission has held that resellers of long distance service in California are not “agents” of other licensed resellers and cannot operate without obtaining their own operating authority.<sup>20</sup>

**1. The Commission Does Not Lack Jurisdiction to Regulate Calling Cards That Permit Interstate or International Calls**

First, Ilatanet claims that the “vast majority of Applicant’s traffic is international; the balance is interstate,”<sup>21</sup> and, Ilatanet argues, “[s]tates do not have jurisdiction over interstate calls,” thus its Application must be dismissed.

However, as discussed more fully in CPED’s OB, Ilatanet misunderstands the basis for the Commission’s jurisdiction. The Commission’s jurisdiction does not depend

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<sup>20</sup> D.05-06-033 at 2; CPED OB at 8.

<sup>21</sup> Motion to Dismiss at 3.

on whether the phone calls placed using its services are interstate or intrastate. The Commission's jurisdiction comes from the fact that Ilatanet offers prepaid calling card services in California as defined by B&P Code section 17538.9 and PU Code section 885.<sup>22</sup> As discussed above, *Skynet* and *NobelTel* conclusively establish that pre-paid calling card services fall under the Commission's jurisdiction, regardless if those services are only minimally intrastate.

Ilatanet cites to *Kaufman v. ACS Systems* (2003) 110 Cal. App 4th 886, 896, for the proposition that "[s]tates do not have jurisdiction over interstate calls." The *Kaufman* decision has very little relevance here, though, because it involved a claim that fax machine owners could not pursue claims under the federal Telephone Consumer Protection Act of 1991 (TCPA), and the suit was brought prior to the existence of Section 885. Moreover, the decision does not support Ilatanet's argument that states may not regulate interstate calls. Instead, the decision noted that the TCPA permitted states to ban nuisance faxes, which were sent using the telephone line. The decision expressly permits the states to exert jurisdiction over harassing telemarketing abuse faxes. In California, the Legislature passed B&P Code Section 17538.4 to ban unwanted faxes, and far from banning state action, the court in *Kaufman* upheld the state's role in enforcing the TCPA. *Kaufman* demonstrates the extent to which federal and state laws work together. Moreover, the quote cited above by Ilatanet is not actually a finding of *Kaufman*, but rather a quote from a legislative history report that is merely cited by the *Kaufman*, not for the purpose of establishing that the state's are preempted, but to show to the need for additional federal action.<sup>23</sup>

Ilatanet's description of cooperative federal-state jurisdiction is vastly oversimplified. It is simply not true that all state action to regulate interstate calls are banned. There are many ways in which states continue to have a legitimate interest in regulation of interstate and international calls and a continuing role to play, despite

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<sup>22</sup> CPED OB at Issue #3.

<sup>23</sup> *Kaufman*, 110 Cal. App. 4th 886, 891.

language in some proceedings that appears to indicate that there is exclusive federal jurisdiction. In fact, states continue to provide important functions.<sup>24</sup>

Moreover, no federal or state court has ever found that Public Utilities Code Section 885 is preempted by federal law. Just the opposite. *Skynet* and *NobelTel*, discussed above and at length in CPED's OB, conclusively establish the Commission's jurisdiction over Ilatanet

Even in *Communication Telesystems International* cited by Ilatanet,<sup>25</sup> the Commission did not disclaim all jurisdiction over interstate and international activities. In fact, the Commission enforced Section 2889.5 (slamming) against CTS, regardless whether those customers made international or interstate calls. It is well-established that the Commission retains certain functions over interexchange carriers, including enforcement and terms and conditions of service, but not rates.

In any event, as discussed above, Ilatanet offers prepaid calling card services, not long distance service. CPED's investigation, Ilatanet's initial application, amended application, and Prehearing Conference statements provide enough information to establish that Ilatanet offers a pre-paid calling card service.

## **2. The Commission's Jurisdiction Does not Depend on the Distinction between "Geography" or "Electronics"**

Again, Ilatanet's OB confuses the basis for the Commission's jurisdiction, which arises from the sale of its pre-paid calling card services in California, as opposed to the destination of the phone calls.

Ilatanet makes a jurisdictional argument that involves the distinction between "geography" and "electronics", whatever that means.<sup>26</sup> Basically, Ilatanet argues that the "method of transmission" of the phone call makes no difference. CPED does not argue,

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<sup>24</sup> See for example, *Kaufman* at 903-904, discussing the "interplay between state and federal law."

<sup>25</sup> Ilatanet OB at footnote 26.

<sup>26</sup> Ilatanet OB at 9.

however, that jurisdiction comes from the nature of the phone call, or whether the phone call is placed using a pre-paid calling card. Instead, jurisdiction arises from the fact that the services are offered and sold in California.

Again, Ilatanet cannot cite to any case that holds that Section 885 is preempted by federal law, because none exist.

### **3. The Commission has Expressly Held that Section 885 Applies to International Calling Cards**

Ilatanet's OB next argues that the Commission has never extended its jurisdiction to interstate or international calls, which is flatly contradicted by *Skynet* and *NobelTel*.<sup>27</sup> Both of those decisions expressly held that whether the calling cards can be used to make international calls makes no difference to the Commission's jurisdiction.

### **4. Public Utilities Code Section 202 Does Not Somehow Invalidate Sections 234, 885, 886, 1001, and 1013**

Ilatanet next argues that Public Utilities Section 202 overrides or somehow invalidates Sections 885, 886, 1001, and 1013.<sup>28</sup> Ilatanet argues that none of these provisions permit the Commission to regulate interstate or international telecommunications. Again, CPED and the ALJ Ruling agree, as discussed above, that Ilatanet has previously acknowledged that it offers a service that is under Commission jurisdiction.<sup>29</sup> CPED is not persuaded that Ilatanet now offers a different unregulated interexchange (long distance) service.

In any event, there are no cases cited in support of this proposition by Ilatanet, because there have been none. No decision has ever held that Section 202 overrides these other sections.

Furthermore, by its own terms Section 202 states that no provisions of the Public Utilities Code "shall apply to commerce with foreign nations or to interstate commerce,"

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<sup>27</sup> Ilatanet OB at 11.

<sup>28</sup> Ilatanet OB at 11.

<sup>29</sup> ALJ Ruling at 8.

but also contains two important limitations: 1) except when specifically so stated, and 2) except insofar as such application is permitted. In the case of Section 885, the Commission has specifically rejected the argument that Section 885 cannot apply to calling cards that permit interstate or international calls. In *NobelTel*, the Commission stated: “There is no exception to the registration requirement simply because NobelTel is a provider of international phone cards and its California intrastate traffic is de minimus.”<sup>30</sup> Thus, Section 885 falls squarely in the exceptions to of Section 202, because it applies to the sale of calling card services in California and also because such regulation is permitted by Federal law. Section 885 applies to offering the services of a pre-paid calling card in California, not to the rates or the calls themselves.

**5. Ilatanet Misconstrues CPED’s Citations to Commission Decisions that Hold that a Reseller of Interexchange Service Must Have Operating Authority**

Ilatanet misconstrues CPED’s citations to three Commission decisions that stand for the proposition that resellers of interexchange services must be licensed.<sup>31</sup> Ilatanet claims that the three cases cited by CPED are irrelevant because “none [] relate to the Commission’s jurisdiction over calling cards or international telecommunications.”<sup>32</sup>

However, Ilatanet states that it does not contest the “unsurprising and non-controversial proposition” that “long distance resellers that operate in California must be licensed.”<sup>33</sup> If this is true, Ilatanet cannot contest the fact that it had no authority to operate as a long distance reseller, because Ilatanet has no authority to operate of any kind.

CPED does not agree that Ilatanet is a long distance reseller, because it in fact offers a calling card service. But for purposes of operating without authority, Ilatanet’s

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<sup>30</sup> D.16-04-018.

<sup>31</sup> Ilatanet OB at 11.

<sup>32</sup> Ilatanet OB at 14.

<sup>33</sup> Ilatanet OB at 13.

argument that it is not a calling card service does not matter. If Ilatanet offers prepaid calling card services, it must be licensed under Section 885. If it resells interexchange service, it must be licensed under Section 1001.

Ilatanet misunderstands the purpose of the citations. Those three cases establish the unremarkable proposition that long distance resellers must be licensed to operate. CPED does not claim that the three cases apply to calling card services. Instead, they relate to Ilatanet's operations without authority, because regardless of whether Ilatanet's service is characterized as long distance service or pre-paid calling card service, they must have a license to operate.

#### **6. Enforcement of Sections 885-887, and 1001 and 103, are Not Prohibited**

Ilatanet next argues that the Commission's "control over market entry" is somehow prohibited by federal law.<sup>34</sup> However, it not necessary for the Commission to reach the issue of whether Section 885's licensing requirement is prohibited, because Ilatanet offers no cases that have overturned Section 885, and no cases that find that the Commission may not regulate calling card services sold to California customers in California. In fact, *Skynet* and *NobelTel* find that the Section 885 expressly authorizes the Commission to exert jurisdiction over calling card providers that market international calling card services.

#### **7. Section 885 Does Not Impermissibly Extend the Commission's Jurisdiction**

Ilatanet next argues that Section 885 cannot extend the Commission's jurisdiction over interstate or international service.<sup>35</sup> Ilatanet claims that 1) the Legislature is presumed to have limited the scope of Section 885 to intrastate services; and 2) the Commission cannot extend its jurisdiction to interstate calls. However, as stated above,

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<sup>34</sup> Ilatanet OB at 15.

<sup>35</sup> Ilatanet OB at 16.

the Commission's jurisdiction in Section 885 arises from the offer and sale of pre-paid calling card services in California, not the nature of the phone calls placed with the cards.

An analogy can be drawn with interstate trucking. Trucks that engage in interstate commerce must nevertheless comply with legitimate state traffic laws. As with trucks, the state's jurisdiction over calling cards arises from the fact that the services are being offered in California, not from the nature of services associated with the cards. Similarly, B&P Code Section 17538.9 controls the terms and conditions of the services associated with the calling cards. For example, B&P Code Section 17538.9 regulates advertisements for calling cards, ancillary charges, information printed on the card, the packaging, and ancillary charges for international cards, among other things. If Ilatanet's theory was correct, the State of California would have no control over the terms of sale of cards to the people of the state within its own borders. Ilatanet argues that the Legislature is presumed to have limited Section 885, but if B&P Code Section 17538.9 specifically mentioned international rates, it can be presumed that the Legislature knew very well that some calling cards would be used for international calls, and yet did not choose to exempt them from the B&P Code or Section 885.<sup>36</sup>

#### **8. Ilatanet Cannot Overcome *Skynet* or *NobelTel***

For several reasons, Ilatanet's OB attempts to distinguish *Skynet*. Ilatanet makes no mention of *NobelTel*, however, which supports *Skynet* and contains the same conclusion.

First, CPED does not dispute that the context of the *Skynet* decision is somewhat convoluted.<sup>37</sup> Nevertheless, the relevant finding in *Skynet* is that there is no exception in Section 885 for international calling cards, which is directly applicable here.

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<sup>36</sup> Similarly, unauthorized charges on a customer's phone bill violate Section 2890, which contains no reference to whether those charges are interstate or international in nature. Also, Section 2889.5 requires carriers to obtain a third party verification recording of a subscriber's intent to switch carriers, regardless of whether the subscriber makes interstate or international phone calls. Obviously, the Legislature was aware that some customers may make interstate or international phone calls.

<sup>37</sup> Ilatanet's OB argues that *Skynet*'s context is important, but fails to establish why. At 18.



Second, Ilatanet claims that *Skynet* is simply wrong.<sup>38</sup> Ilatanet argues that *Skynet* was a “prime candidate for rehearing” without explanation. For the reasons stated above, CPED believes the *Skynet* decision’s conclusion that there is no exception from Section 885 for international cards is correct and should be followed.

Third, Ilatanet argues in defiance of the ALJ Ruling on the Motion to Dismiss that Ilatanet does not offer calling cards, and therefore *Skynet* is inapplicable.<sup>39</sup> For the reasons stated above, CPED is not persuaded that Ilatanet does not offer a calling card service.

Ilatanet’s attempts to distinguish *Skynet* all must fail, because it is highly relevant decision that contains a factual pattern that is indistinguishable from this one.

**D. Has Ilatanet been offering services for which operating authority from this Commission is or was required without obtaining such authority?**

Ilatanet argues that it currently does not offer any services subject to jurisdiction.<sup>40</sup> Without any support in the record, Ilatanet claims that its services do not permit intrastate calling. There is no citation anywhere in Ilatanet’s OB to the record where intrastate call blocking has been established. The only citation is from the PHC transcript, where Mr. MacBride stated that intrastate phone calls could be blocked if necessary.<sup>41</sup> Similar to its prior about-face on whether it provides a calling card service, Ilatanet again contradicts its prior statements, because at the PHC it only claimed that intrastate call blocking was possible; now it claims that blocking has been occurring since 2014.

Nevertheless, Ilatanet acknowledges that “Between approximately November 1, 2012 and September of 2014, Ilatanet subscribers in California were able to place

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<sup>38</sup> Ilatanet OB at 20.

<sup>39</sup> Ilatanet OB at 21.

<sup>40</sup> Ilatanet OB at 23.

<sup>41</sup> Counsel for Ilatanet stated during the PHC Transcript at pages 28-29: “If need be, if need be, the switch can be blocked, and then the case is over.”

intrastate calls using Ilatanet's service."<sup>42</sup> This statement should provide sufficient evidence that Ilatanet offers an amount of intrastate service, and thus its claims that it offers no intrastate service should be disregarded. Whether or not the amount of intrastate calls is *de minimis* is irrelevant, after the *Skynet* and *NobelTel* decisions.

But regardless of what is stated in its OB that contradicts its earlier statements, the Commission should not simply disregard Ilatanet's prior representations in its submissions to the Commission. Ilatanet's initial Application admits that it was offering calling card services prior to filing this Application for authority to do so. An attachment to the Application states that it has been doing so since at least 2011.<sup>43</sup> Ilatanet's website <http://www.mytawagnadirect.com>, states that Ilatanet has been offering "long distance services to the Filipino-American community for over 12 years."<sup>44</sup> As discussed more thoroughly in CPED's OB and the ALJ Ruling, there is sufficient evidence from past statements and from the Ilatanet website for the Commission to conclude that Ilatanet offers a calling card service. Its subsequent about-face appears to be solely for the purpose of avoiding jurisdiction.

Somewhat confusingly, Ilatanet claims that the ALJ Ruling does not assert that Ilatanet's service is that of a "prepaid calling card."<sup>45</sup> It is difficult to square that misrepresentation with the actual words of the ALJ Ruling, which states: "The services provided by the Applicant appear to be, in effect, calling card services as defined in Business & Professions (Bus. & Prof.) Code Section 17538.9."

Ilatanet repeats many of mistakes of fact described above. For example, Ilatanet states that it does not require an authorization code.<sup>46</sup> However, the ALJ Ruling rejected

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<sup>42</sup> Ilatanet OB at 24.

<sup>43</sup> Application 14-01-029 Exhibit 5 Biographical Information Douglas Devine Resume.

<sup>44</sup> CPED Protest at 3.

<sup>45</sup> Ilatanet OB at 25.

<sup>46</sup> Ilatanet OB at 25.

this claim, and the Declaration of Brian Hom submitted by CPED proves that the company provides an authorization code to its customers.<sup>47</sup>

**E. If Ilatanet has been offering regulated services without operating authority, should it be subject to fines and penalties under Sections 2107 and 2108?**

Ilatanet argues that penalties cannot be imposed, first because it claims that it is not a utility, and second because this a ratesetting proceeding.<sup>48</sup>

First, the Legislature granted the Commission the authority to impose fines in Section 886, which states that entities that fail to obtain the appropriate authority to offer calling card services “shall be subject to fines or other sanctions that may be ordered by the commission.” (Emphasis added.) Thus the Commission’s authority does not depend on Ilatanet’s status as a public utility. Second, the Scoping Memo placed Ilatanet on notice that fines are an issue in this proceeding. All that is required is that the Commission provide notice and a hearing in order to satisfy due process.<sup>49</sup> There is no rule or law that prevents the Commission from considering fines in a ratesetting hearing, and Ilatanet cites to none.

In any event, Ilatanet’s argument comes too late. Section 1701.1(a) provides:

The commission’s decision as to the nature of the proceeding shall be subject to a request for rehearing within 10 days of the date of that decision. If that decision is not appealed to the commission within that time period it shall not be subsequently subject to judicial review.

The record in this proceeding shows that Ilatanet did not appeal the designation as “ratesetting” until now, and thus it is too late.

Third, Ilatanet argues that no fine amount is justified, because its amount of intrastate traffic was “incidental.”<sup>50</sup> However, this argument addresses only the violation

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<sup>47</sup> ALJ Ruling at 4; see Declaration of Brian Hom, Attachment A to CPED’s Reply to Motion to Dismiss.

<sup>48</sup> Ilatanet OB at 27.

<sup>49</sup> Public Utilities Code Section 1701.1.

<sup>50</sup> Ilatanet OB at 29.

for operations without authority, and even so, it fails to acknowledge that Mr. Devine has been specifically warned about operating without authority and personally signed a settlement agreement wherein he stipulated that he would not do so again. The violation was knowing and intentional.

Additionally, there are four other distinct categories of offenses that are not addressed by Ilatanet. In addition to providing calling card services in California without authority in violation of Sections 885-886,<sup>51</sup> Ilatanet's president Mr. Devine was personally enjoined from operating a calling card company without authority in the Settlement Agreement entered into here at the Commission and approved as part of a joint CPUC-AG superior court proceeding in 2006, which he has been violating as described above. This also shows that Mr. Devine knowingly and intentionally violated the settlement and stipulation.

Also, Mr. Devine personally committed to disclose prior settlements and judgments in all future applications here at the Commission, which he failed to do. The settlement agreement was adopted as part of D.07-11-003, and thus violating the agreement is also a violation of a Commission decision, punishable under Sections 2107-2108.

Further, CPED's Protest alleges that Ilatanet provided misleading and inaccurate statements in its Application that failed to disclose the existence of adverse regulatory actions, in violation of the Commission's application requirements.<sup>52</sup>

Finally, after repeatedly characterizing its service as a calling card service for which it needs operating authority, Ilatanet now mischaracterizes its service as a generic "resold interexchange service." However, its website describes a calling card service, as discussed above, and attempts by CPED staff to sign up for the service also indicate that the service is a calling card service. Rule 1.1 prohibits parties from misleading the Commission through artifice or false statements, and it appears that Ilatanet's attempts to

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<sup>51</sup> Ilatanet's website advertised that it has been providing calling card services for 12 years, as of 2014.

<sup>52</sup> CPED Protest at 6.

re-characterize its service are nothing more than an attempt to avoid the Commission's jurisdiction and any responsibility for violating the settlement agreement and permanent injunction.

The Commission would be justified in imposing a fine for each day Ilatanet operated without authority since 2002, or approximately 5,000 days, if Ilatanet's website is accurate. The Commission would also be justified imposing a separate fine for each day that Mr. Devine has operated in violation of the Settlement Agreement and Injunction. CPED discusses the factors the Commission typically considers in the fine amount at pages 15-18 of its OB.

In addition to fines, the Commission may also consider denying Ilatanet's Application and ordering Ilatanet to cease all operations, because Ilatanet has demonstrated a long history of flouting the Commission's rules and decisions as well as the San Francisco Superior Court Permanent Injunction. As a result of these violations, Ilatanet has not demonstrated the necessary fitness to operate as a calling card service provider and a denial would be justified.

**F. Have pleadings in this proceeding been filed with the intention to mislead the Commission, its staff and ALJs, in violation of Rule 1.1?**

Ilatanet's OB admits that "erroneous" filings were made with the Commission by Ilatanet.<sup>53</sup> Without a good explanation as to why, Ilatanet claims that "omitted material should have been included."

CPED's OB contains a list of the documents that were omitted from the Application.<sup>54</sup> Ilatanet omitted these important background facts, despite being specifically told to disclose them in a prior settlement and stipulating that it would do so, which was adopted by a Commission decision (D. 07-11-003). The prior adverse regulatory history bears directly on the Commission's determination regarding the

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<sup>53</sup> Ilatanet OB at 30.

<sup>54</sup> CPED OB at 19-20.

Applicant's fitness to operate; thus it is fair to conclude that Ilatanet omitted them because it wanted its Application to be granted. Mr. Devine further stated at the PHC that he was unaware of any of these past adverse regulatory actions due to first living in San Francisco, then living overseas, and stated that he never received any notice of these issues.<sup>55</sup> When asked at the PHC if it was his responsibility to make sure he was informed about past regulatory issues throughout the country, Mr. Devine did not answer the question.<sup>56</sup>

Only after CPED's Protest highlighted the omissions did Ilatanet admit to them and include them in its amended application. Ilatanet now claims that it made the required disclosures in August 2014, but this was only after being caught by CPED. Ilatanet offers no arguments as to why Ilatanet should not be fined for making filings containing false and misleading information in violation of Rule 1.1.

**G. Does Ilatanet have sufficient financial resources as required by Decision (D.) 95-12-056 (and recently restated in D.14-11-004)?**

Ilatanet now claims that the financial resources requirements are moot since it claims to offer no regulated services.

**H. Does Ilatanet have sufficient management expertise as required by D.95-12-056 (and clarified by D.13-05-035)?**

Strangely, Ilatanet maintains that it has demonstrated sufficient management expertise, despite the fact that it no longer seeks any authority from the Commission and wishes to withdraw its application.

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<sup>55</sup> PHC Transcript at 20:19-24. When asked whether he was aware of the Superior Court injunction, he responded: "That's a shock to me."

<sup>56</sup> PHC Transcript at 21:7-9.

**I. What is the status of Ilatanet's payment of fines and penalties imposed by this Commission, and other state and federal regulatory authorities?**

Ilatanet claims that there are no outstanding fines to the Commission or any other entity.<sup>57</sup> This is flatly contradicted by Ilatanet's response to the ALJ's requests for further information, which explains that \$112,531.57 of a \$281,326.43 debt to the FCC by Devine Communications was paid leaving a balance of \$168,794.86.<sup>58</sup> Although DCI is no longer providing telecommunications services, Ilatanet claims that Mr. Devine "will continue to remit payments on each debt" to the FCC. This is yet another example of Ilatanet's inconsistent statements.

**J. What is the status of Ilatanet's payment of public purpose program surcharges and user fees, if any, due to this Commission?**

CPED is not aware that Ilatanet has paid any public purpose program surcharges or user fees. However, Ilatanet states that it is prepared to make any payments due pursuant to the Commission's public purpose programs for the period between November 1, 2012 and September 30, 2014.

**K. Has the applicant put into place the personnel, processes and procedures necessary to maintain regulatory compliance?**

Ilatanet argues that this requirement is irrelevant because Ilatanet no longer seeks Commission authority.

**L. Does this Application pose any safety considerations, and, if so, how shall they be addressed?**

CPED does not dispute that Ilatanet's service is switchless and therefore poses no safety considerations.

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<sup>57</sup> Ilatanet OB at 31.

<sup>58</sup> Ilatanet Amended Response submitted on August 15, 2014, at pages 11-12.

### III. CONCLUSION

The Commission should not grant Ilatanet a CPCN until it has satisfactorily resolved all the issues identified in the May 9, 2016 Scoping Memo, and addressed in this brief. Specifically, Ilatanet and Mr. Devine must:

- Provide the necessary documentation of Ilatanet's financial resources in the form of audited financial statements;
- Provide the necessary \$25,000 bond as required by D. 13-05-035;
- Pay any owed public purpose program surcharges or user fees;
- Demonstrate that Mr. Devine has paid or is in the process of paying prior fines, judgments, penalties, etc. as detailed in this brief; and
- Demonstrate that they have the necessary business infrastructure in place to comply with regulatory rules and laws.

In addition, Ilatanet has been offering a regulated service without operating authority and should be subject to fines and penalties under Sections 2107 and 2108 of the PU Code. Ilatanet also committed a violation of Rule 1.1 by failing to disclose the prior regulatory violations of Mr. Devine and by mischaracterizing the service which it offers for purpose of avoiding regulatory responsibility. CPED recommends fines for these violations in an amount sufficient to be a deterrence, and recommends a denial of Ilatanet's application resulting in it ceasing operations in California.

Respectfully submitted,

/s/ TRAVIS T. FOSS

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Travis T. Foss  
Staff Counsel

Attorney for the Consumer Protection  
and Enforcement Division

California Public Utilities Commission  
505 Van Ness Avenue  
San Francisco, CA 94102  
Phone: (415) 703-1998  
[Travis.Foss@cpuc.ca.gov](mailto:Travis.Foss@cpuc.ca.gov)

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